Supreme Court, U.S.
FILED
MAY 2 2000
CLERK

No. 99-1565

IN THE

Supreme Court of the United States

AMERICAN AIRLINES, INC.,

Petitioner,

v.

MARIA V. CRUZ, for herself and as representative of GUSTAVO CRUZ and JOAQUIN RODRIGUEZ, minors; BEATO CRUZ; SANDRA MARIA CRUZ as representative of YOVARY POLANCO, a minor; JOSE ALFREDO GOMEREZ; and LENOR DURAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONER

THEODORE B. OLSON
Counsel of Record
LARRY L. SIMMS
THOMAS G. HUNGAR
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for American Airlines, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. Respondents Err In Contending That The Decision Below Can Be Harmonized With The Rule Of Interpretation Applied By Other Courts In Warsaw Convention Cases 1

II. The Court Of Appeals' Conclusion That Montreal Protocol No. 4 Is Not A Clarification Of Article 4 Requires This Court's Review 6

III. The Question Presented Is Important And Recurring 7

CONCLUSION 8

TABLE OF AUTHORITIES

Cases **Page(s)**

Black Sea & Baltic General Ins. Co. Ltd. v. Scandinavian Airlines System (Zurich High Court, 2d Civ. Chamber (March 4, 1966) 5

Brink's Ltd. v. South African Airways, 93 F.3d 1022 (2d Cir. 1996) 3

Corocraft Ltd. v. Pan Am. Airways Inc., [1969] 1 Q.B. 616, [1968] 3 W.L.R. 1273, [1969] 1 All E.R. 82) 5

Cortes v. American Airlines, Inc., 177 F.3d 1272 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 980 (2000) 6,7

Dico Handel-en Industrie Mij. N.V. v. Garuda Indonesian Airways, P.N., No. 83 Schip en Schade 1970, 199 (Dist. Ct. Amsterdam, Oct. 29, 1969) 5

El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155 (1999) 6,7

Feeney v. America West Airlines, 948 P.2d 110 (Colo. Ct. App. 1997) 2,3-4

Hibbard v. Trans World Airlines, Inc., 592 N.E.2d 889 (Ohio Ct. App. 1990) 2

Horton v. California, 496 U.S. 128 (1990) 2

Lourenco v. Trans World Airlines, Inc., 581 A.2d 532 (N.J. Super. Ct. Law Div. 1990) 2

Montana v. Imlay, 506 U.S. 6 (1992) 2

Onyeanusi v. Pan Am, 952 F.2d 788 (3d Cir. 1992) 3

TABLE OF AUTHORITIES—Continued

Page(s)

Republic National Bank v. Eastern Airlines, Inc., 815 F.2d 232 (2d Cir. 1987) 4

Ross v. Pan Am. Airways, Inc., 85 N.E.2d 880 (N.Y. 1949) 4

Stratis v. Eastern Air Lines, Inc., 682 F.2d 406 (2d Cir. 1982) 2,3

Tseng v. El Al Israel Airlines, Ltd., 919 F. Supp. 155 (S.D.N.Y. 1996), *rev'd in part, aff'd in pertinent part*, 122 F.3d 99 (2d Cir. 1997), *rev'd in part on other grounds*, 525 U.S. 155 (1999) 4,5

REPLY BRIEF FOR PETITIONER

Respondents contend that certiorari is not warranted in this case because there is no conflict among the authorities, the decision below is legally defensible, and the question presented is unimportant. These assertions are without merit. Respondents effectively concede the existence of a widespread conflict among the relevant federal, state, and foreign cases by failing to cite, let alone distinguish, the bulk of the conflicting authorities discussed in the petition. Equally meritless is respondents' defense of the ruling below, which, as even the court of appeals did not dispute, adopts an interpretation of the Warsaw Convention that "has no apparent purpose" and "makes little sense." Pet. App. 7a. Indeed, respondents do not even address the textual ambiguities that fatally undermine the court of appeals' insistence on its purportedly "plain language" interpretation of the Convention. *See* Pet. 6-7, 15-16 n.9; *see also* Br. of Air Transp. Ass'n of Am. as Amicus Curiae ("ATA Br.") 2-6. And contrary to respondents' assertion, the question presented in the petition has substantial continuing importance both for currently pending cases and for future cases that undoubtedly will arise under the Warsaw Convention as modified by Montreal Protocol No. 4. Accordingly, respondents' objections are without merit, and certiorari should be granted.

I. Respondents Err In Contending That The Decision Below Can Be Harmonized With The Rule Of Interpretation Applied By Other Courts In Warsaw Convention Cases

Respondents contend that "no conflict exists as requires resolution by this Court" (Opp. 1), but their brief in opposition altogether ignores the vast majority of the conflicting authorities relied upon by American in its petition. Thus, for example, respondents do not and can-

not dispute American's showing that the rule of law applied by the court below conflicts directly with the decisions of several state appellate courts holding, in factual circumstances indistinguishable from those presented here, that technical non-compliance with the Warsaw Convention's notice requirements will not deprive airlines of their right to limited liability. Pet. 11-12 (citing *Feeney v. America West Airlines*, 948 P.2d 110 (Colo. Ct. App. 1997); *Hibbard v. Trans World Airlines, Inc.*, 592 N.E.2d 889 (Ohio Ct. App. 1990); *Lourenco v. Trans World Airlines, Inc.*, 581 A.2d 532 (N.J. Super. Ct. Law Div. 1990)). This Court has frequently granted certiorari to resolve such conflicts among federal and state appellate courts. *See, e.g.*, *Horton v. California*, 496 U.S. 128, 132 & n.3 (1990); *Montana v. Imlay*, 506 U.S. 6, 6-7 (1992) (White, J., dissenting).[1]

Similarly, without disputing American's showing that numerous federal cases construing the analogous provisions of Article 8 of the Convention have refused to follow the wooden and rigid approach to treaty interpretation adopted by the court below, respondents contend that this Court should ignore that conflict because the Second Circuit cases cited by American have not been expanded beyond their holdings. Opp. 2, 4-5. As American demonstrated in its petition, however, the Second Circuit has expressly reaffirmed its rule that the Warsaw Convention's limitations on liability must be enforced despite an air carrier's failure to observe those aspects of Article 8 that are analogous to the baggage

---

[1] Respondents also ignore American's reliance on *Stratis v. Eastern Air Lines, Inc.*, 682 F.2d 406 (2d Cir. 1982), which held, in direct contrast to the decision below, that the failure to comply with the Convention's notice requirements was "simply a technical irregularity" that did not justify depriving the airline of the benefit of the liability limitation. *Id.* at 411, 412-14.

weight provisions at issue in this case. Pet. 13-14 & n.8.[2] Moreover, respondents completely ignore the fact that the Third Circuit has also adopted the rule that "a 'technical and insubstantial omission[]' . . . does not affect the Convention's limitation of liability." *Onyeanusi v. Pan Am*, 952 F.2d 788, 794 (3d Cir. 1992).

Equally unavailing is respondent's contention that these conflicting cases are inapposite because they rest on the existence of an ambiguity in the original French text of Article 8. As discussed in the petition (Pet. 15-16 n.9) and as detailed by the Air Transport Association of America in its amicus curiae brief (ATA Br. 2-6), the original French text of Article 4 contains a similar ambiguity.

Respondents also ignore the cases holding that the Convention's liability limitations are applicable despite an air carrier's non-prejudicial failure to observe the requirement that tickets and baggage checks contain a written notice of the applicability of the liability limitations. *See* Pet. 12-13 (citing *Stratis v. Eastern Air Lines, Inc.*, 682 F.2d 406 (2d Cir. 1982); *Feeney v.*

---

[2] As the petition observed (Pet. 14 n.8), the Second Circuit has declined to extend this rule to other, inapposite contexts, but respondent errs in contending that the Second Circuit's approach can therefore be harmonized with the decision below. With respect to non-prejudicial technical irregularities of the type at issue here—namely, the failure to specify the number and weight of lost or damaged items—the Second Circuit squarely holds that the liability limitations are applicable. *See* cases cited at Pet. 14. Respondent also errs in suggesting (Opp. 5) that *Brink's Ltd. v. South African Airways*, 93 F.3d 1022 (2d Cir. 1996), is to the contrary. In fact, *Brinks* expressly reaffirmed the Second Circuit's rule that the omission of the number and weight of packages "does not deprive a carrier of limited liability . . . unless the omission is of practical commercial significance." *Id.* at 1033.

America West Airlines, 948 P.2d 110, 112-13 (Colo. Ct. App. 1997); *Ross v. Pan Am. Airways, Inc.*, 85 N.E.2d 880, 884 (N.Y. 1949)). As explained in the petition (Pet. 23-24) and in part III below, this conflict is particularly significant because it is also implicated by the provisions of Montreal Protocol No. 4.

Respondents err in contending that the court of appeals' decision is consistent with *Republic National Bank v. Eastern Airlines, Inc.*, 815 F.2d 232 (2d Cir. 1987). As the court of appeals itself recognized (Pet. App. 8a), *Republic National Bank* plainly conflicts with the rule of law adopted below. To be sure, the *Republic National Bank* court was careful to describe its holding in terms of the factual circumstances before the court (*i.e.*, the relatively sophisticated nature of the party whose bag was lost), but there is no basis in the Convention's text or purpose for limiting the Second Circuit's rule to that context, and it logically applies to all non-prejudicial omissions of Article 4(3)(f) particulars.[3]

---

[3] As respondents note (Opp. 2), some district courts have rejected the *Republic National Bank* rule in the context of non-commercial passenger travel, but as explained in the petition (Pet. 10-11 n.6), other district courts have reached the opposite conclusion, further demonstrating the need for this Court's review. Respondents err in claiming (Opp. 2-3) that *Tseng v. El Al Israel Airlines, Ltd.*, 919 F. Supp. 155 (S.D.N.Y. 1996), *rev'd in part, aff'd in part*, 122 F.3d 99, 108 (2d Cir. 1997), *rev'd in part*, 525 U.S. 155 (1999), did not involve the question at issue here. The district court in *Tseng* squarely held that "[t]he Convention also applies to plaintiff's claims for damages to her checked and carry-on luggage," despite the fact that "[t]here has been no evidence showing how much [plaintiff's] suitcase weighed." 919 F. Supp. at 158, 160. Expressly relying on *Republic National Bank*, the *Tseng* court reasoned that "[w]here the weight of a

[Footnote continued on next page]

Respondents do not even address the conflict between the decision below and the precedents of foreign courts that take a more realistic and flexible approach to the interpretation of analogous provisions of the Warsaw Convention. Pet. 15-18 (citing *Corocraft Ltd. v. Pan Am. Airways Inc.*, [1969] 1 Q.B. 616, [1968] 3 W.L.R. 1273, [1969] 1 All E.R. 82; *Dico Handel-en Industrie Mij. N.V. v. Garuda Indonesian Airways, P.N.*, No. 83 Schip en Schade 1970, 199 (Dist. Ct. Amsterdam, Oct. 29, 1969); and *Black Sea & Baltic General Ins. Co. Ltd. v. Scandinavian Airlines System* (Zurich High Court, 2d Civ. Chamber (March 4, 1966)). Respondents offer no ground for distinguishing these precedents, and there is none. As the British Court of Appeal succinctly put it in *Corocraft*, the position advanced by respondents here (and adopted by the court of appeals below) "is a highly technical point, devoid of all merit." [1969] 1 Q.B. at 651.

Moreover, as discussed in the petition (Pet. 5 & n.3, 22) and in the amicus brief submitted by the Air Transport Association (ATA Br. 6-8), American and other air carriers have long understood the Warsaw Convention to permit carriers to follow precisely the approach taken by American here, without any resultant loss of the Convention's liability limitations. That longstanding interpretation has been embodied in tariffs filed by American and other carriers and accepted by the Department of Transportation. *See* Pet. 5 n.3; *see also* ATA Br. 6-8. Accordingly, that interpretation, which is irreconcilable with the court of appeals' construction of the Convention, is entitled to deference from the courts. *See, e.g.*,

---

[Footnote continued from previous page]
passenger's baggage is not noted on the baggage check, the weight may be based on the maximum allowable weight as set forth in the airline's tariff" (*id.* at 160)—precisely as American argued to the court of appeals in this case.

El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 168 (1999); ATA Br. 6.

For all the foregoing reasons, it is plain that the decision below conflicts with numerous decisions of federal, state, and foreign courts, and with the Executive Branch's interpretation of the Convention. Given this Court's recognition of the special need for international uniformity in interpretation of the Warsaw Convention (Pet. 17-18), and in view of the court of appeals' admonition that "it is for the Supreme Court to supply uniformity" (Pet. App. 8a), this Court's review is essential.

II. The Court Of Appeals' Conclusion That Montreal Protocol No. 4 Is Not A Clarification Of Article 4 Requires This Court's Review

Respondents contend that *Cortes v. American Airlines, Inc.*, 177 F.3d 1272 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 980 (2000), and *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999), are distinguishable from the decision below because this case purportedly involves a "deletion" rather than a "clarification." Opp. 5. To the contrary, however, both *Cortes* and *Tseng* involved "deletions" as well. In *Tseng*, Montreal Protocol No. 4 deleted the former provision of Article 24 which had limited the Convention's exclusivity provision to cases "covered by" specific Articles, and instead applied the exclusivity provision to "the carriage of passengers and baggage." 525 U.S. at 163, 174. In *Cortes*, Montreal Protocol No. 4 deleted Article 25's reference to "willful misconduct" and replaced it with a different formulation. 177 F.3d at 1282. Both courts nonetheless held that the newly inserted language was merely a "clarification" of the deleted text, rather than a substantive amendment. The same is true here.

Respondents make no other attempt to reconcile the approach followed below with the rule enunciated in

Cortes and *Tseng*. In fact, the inconsistency is readily apparent: *Cortes* holds that a preexisting conflict in the authorities is a "significant factor" that must be considered by the lower courts in determining whether a legislative modification is a clarification (177 F.3d at 1283); by contrast, the court below conceded the existence of a conflict in the authorities but gave that conflict no weight at all in its analysis, apparently in the erroneous belief that this Court alone should consider such matters. Pet. App. 8a-9a. Similarly, *Tseng* placed great weight on the need for international uniformity and on the Convention's goal of avoiding unlimited liability (525 U.S. at 169-71), but the court below simply ignored those considerations in favor of its single-minded and formulaic insistence on a rigid interpretation of technical requirements. These glaring inconsistencies require resolution by this Court.

III. The Question Presented Is Important And Recurring

Respondents suggest (Opp. 3) that the question presented is of no future significance because Montreal Protocol No. 4 makes clear that an air carrier's failure to specify the weight and number of bags on a baggage check will not deprive that carrier of the Convention's liability limitation. As demonstrated in the petition (Pet. 22-25), however, the question presented actually retains considerable future significance, both because of the massive class actions currently pending in the lower courts and because similar issues will continue to arise in future cases under the Convention. Indeed, respondents do not even attempt to refute American's showing that the same question of the appropriate interpretive rule will arise in future cases under the Convention as modified by Montreal Protocol No. 4, because the Convention continues to impose certain notice and delivery requirements on air carriers and provides that noncompliance with these requirements may render the liability limitations inapplicable. *See* Pet. 23 (citing Arti-

cles 3(1) and 4(1) of the Convention as amended). The question whether non-prejudicial technical omissions justify depriving air carriers of the Convention's limitations on liability is thus of continuing importance, and merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
LARRY L. SIMMS
THOMAS G. HUNGAR
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for American Airlines, Inc.

May 2, 2000